Date: 20150309

File: 567-02-129

Citation: 2015 PSLREB 25

Public Service Labour Relations Act Before an adjudicator

BETWEEN

FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL (EAST)

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence – includes DRDC)

Employer

Indexed as
Federal Government Dockyard Trades and Labour Council (East) v. Treasury Board (Department of National Defence – includes DRDC)

In the matter of a group grievance referred to adjudication

Before: Augustus Richardson, adjudicator

For the Bargaining Agent: Raymond Larkin, QC, and Jillian Houlihan, co-counsel

For the Employer: Allison Sephton, counsel

Heard at Halifax, Nova Scotia,
January 13 and 14, 2015.

I. Grievances referred to adjudication

[1] The Federal Government Dockyard Trades and Labour Council (East) ("the Council") is the bargaining agent for employees who are members of 10 affiliate unions working at Fleet Maintenance Facility Cape Scott ("FMF Cape Scott"), in Halifax, Nova Scotia. At all material times, the Treasury Board (Department of National Defence) ("the employer") and the Council were parties to an agreement between them for the Ship Repair (East) Group with an expiry date of December 31, 2011 ("the collective agreement"). In the absence of any objection from the parties I proceed on the assumption that the agreement continued in effect as of the date of the collective grievance with which I am concerned.

[2] On June 6, 2012, the Council presented a group grievance pursuant to s. 215 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*"), on behalf of two employees, Cory Nixon and Curtis Eagles. Although Mr. Nixon and Mr. Eagles are not formally the grievors in this case, I will refer to them collectively as "the grievors" in this decision. The grievance alleges that the employer had failed to compensate the grievors in accordance with the collective agreement for time they spent at Fleet Maintenance Facility Cape Breton ("FMF Cape Breton") in Victoria, British Columbia. The employer refused their grievance through three levels of the grievance process. The grievance was eventually referred to adjudication.

[3] The hearing took place in Halifax on January 13 and 14, 2015. The bargaining agent called the following individuals to testify:

a. Mr. Eagles, one of the two grievors, and

b. Lorne Brown, who was and is president of the Council.

[4] The employer called the following two witnesses:

a. Darrell Joseph, who has been a Group 5 manager for "C14" (dealing with command and control computers, electronics, and so on) at FMF Cape Scott since August 2008; and

b. David Lowdon, who at the material time in May 2012 was a Group 5 manager (Electronics) at FMF Cape Breton.

[5] I note that I heard the testimony of Mr. Lowdon, who was in Victoria, via videoconference from the employer's facilities in Halifax.

[6] A number of documents were also entered as exhibits.

[7] The parties did not dispute the facts of the matter, but in dispute were the meaning and intent of the applicable provisions of the collective agreement to those facts. That being the case, I will simply set out my findings based on the testimonies of the witnesses and the documents and will refer to the evidence only when necessary to explain those facts.

[8] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the new Board") to replace the former Public Service Labour Relations Board ("the former Board") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act*, *No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act*, *No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *PSLRA* as that *Act* read immediately before that day.

II. The background

[9] The grievors worked at FMF Cape Scott. They were both communication systems technicians. They were regularly assigned to and worked day shifts, which ran from 7:45 to 16:15, Monday to Friday. Their work included installing, testing and repairing the various types of electronic communications systems on the Canadian navy's vessels and submarines. One of these communication systems involved the use of satellites to transmit and receive data. At the material time, the employer had commenced work to upgrade the satellite communication system on the navy's vessels; one of the objects of the upgrade was to improve and increase Internet access. The installation of the upgraded system was to be rolled out across the navy's west and east coast fleets over time. The grievors were to have been part of the team responsible for the installation of the upgraded system when it occurred on the east coast.

[10] The new system was designed and manufactured by a U.S. company with a production facility in Florida. The company delivered an in-house training course dealing with the new system at its facility in Florida. The course included classroom instruction on the theory underlying the operation of the new system (delivered by way of, among other things, classroom presentations and PowerPoint presentations) together with hands-on demonstrations of the new system at the facility. The course covered five days. The grievors, together with two technicians from FMF Cape Breton, attended the course in Florida in October 2011.

[11] The grievors learned that the first installation (called a "set to work" or "STW") of the new system had been scheduled to take place at FMF Cape Breton sometime in the spring of 2012. They also knew that the system would subsequently be installed on vessels in the east coast fleet. Mr. Nixon, who was then an acting communications shop supervisor, thought that it would be a good idea for FMF Cape Scott to send someone to Victoria to observe the STW of the new system there.

[12] With that in mind, Mr. Nixon prepared a "Training Proposal" in early 2012. The proposal provided a cost estimate to send a technician from Halifax to Victoria to observe the first STW. In the proposal, he justified it on the following grounds (Exhibit E5, Tab 1):

> *… As there is no training on the horizon for this equipment the knowledge gained by observing, and participating, will be invaluable to FMFCS* [FMF Cape Scott] *to continue providing top quality service to the Fleet. There will also be an added bonus as the FSR will be present to put questions to during the STW.*

[13] "FSR" is the abbreviated form of "Factory Service Representative." Mr. Eagles explained that during the first STW of a system, the manufacturer (sometimes referred to as the "OEM" or "Original Equipment Manufacturer") would usually send an FSR to the site to provide technical information and assistance with respect to its installation, testing and operation, as well as to answer any questions the technicians might have.

[14] The proposal eventually expanded to include sending two technicians, the grievors, to Victoria to observe the STW. The proposal met with an enthusiastic reaction from management. Ken Cox, an engineer with the employer located in Ottawa, Ontario, who was overseeing the entire installation project, advised in February 2012

that there was no problem with the proposal providing that the cost of sending the technicians came out of the east coast facility's budget (Exhibit E5, Tab 2). Gail Schrader, an acting communications shop supervisor at FMF Cape Scott, thought that it ". . . would be an excellent training opportunity for our personnel to work with this new communications equipment" (Exhibit E5, Tab 2). Mr. Lowdon, at FMF Cape Breton, thought that it was "an absolutely brilliant idea" (Exhibit E5, Tab 3).

[15] On April 11, 2012, Mr. Eagles was advised of the following for himself and one other person (who eventually turned out to be Mr. Nixon) (Exhibit E5, Tab 5):

> … [you] *have been selected to 'observe' the STSCU* [Short Term Satellite Communications Upgrade] *STW aboard the HMCS Ottawa at FMFCB. You have been selected as you are one of only two shop members with formal training on this new system. You are expected to bring back and share, the knowledge gained during STW, the formal coursing [sic] already taken, with any interested comm shop members.*

[16] As it turned out, the vessel on which the short-term satellite communications upgrade (STSCU) was to be installed was changed to the Her Majesty's Canadian Ship (HMCS) Regina. The dates for the STW were eventually finalized to commence the week of May 7, 2012.

[17] The grievors travelled to Victoria, arriving on Tuesday, May 8 in the afternoon (Victoria time). It was about 19:00 Halifax time by the time they got to their hotel. They were expecting to attend the STW the next morning at their regular daytime shift (7:45 to 16:15). Later that evening, a number of the west coast technicians who were going to be doing the STW that the grievors were to observe came to the hotel. They told the grievors that a change of shift had been instituted for the work. The STW was to start the next day but on the night shift at 23:45. The west coast technicians explained that the change was necessary because of hazards to people working at the dockyard associated with the use of the powerful high-frequency beams associated with testing and operating the upgraded system. If the beams were interrupted by, for example, a dockyard crane, injury could result to the crane operator. Accordingly, it was thought safest to conduct the STW testing at night, when the dockyard was otherwise not operating.

[18] The next morning at 7:45 Victoria time, the grievors contacted their east coast manager for directions in response to the news about the change in shift.

[19] At 13:41 (Halifax time) on May 9, 2012, William (Greg) Sample, the acting work centre manager for "C4T (Comms, Nav/Support)" at FMF Cape Scott, emailed Mr. Joseph to advise that the STW on the HMCS Regina ". . . will be taking place on the S1 shift starting tonight at midnight due to radiate [*sic*] related scheduling conflict, consequently we are moving our folks to the S1 to coincide" (Exhibit E5, Tab 7). He added that Ms. Schrader and Dirk Bouter, another acting work centre supervisor, were in the process of preparing a shift change letter. At 15:18, Mr. Bouter emailed the shift letter to Mr. Nixon, adding that "[b]asically, you're on shift 1, 23:45 to 8:15 starting tonight until 8:15 on the 16th" (Exhibit E5, Tab 6).

[20] Mr. Eagles testified that while waiting for management's shift letter (that is, its directions as to what the grievors should do), he and Mr. Nixon waited in their hotel room.

[21] There was no dispute at the hearing that the shift letter referred to is a more-or-less standard form letter that is issued to an employee whose regular shift is changed. In this case, the shift letter was titled, "Notice of First (Midnight) Shift–HMCS Regina STSCU Set to Work" (Exhibit E5, Tab 8). The letter, issued over the signature of Roger Baraket, the production manager for the commanding officer at FMF Cape Scott, stated that the shift ". . . is required to progress work on HMCS Regina STSCU Set to Work as identified by FMF Cape Breton." It gave notice that the shift would commence at 23:45 on Wednesday, May 9, 2012, and that it would continue until the end of the project at 8:15 on May 16, 2012. It added that ". . . pay and benefits will be in accordance with the relevant collective agreement" (Exhibit E5, Tab 8).

[22] Mr. Joseph testified that the issuance of the shift letter was standard practice when an employee was moved from one shift to another. Such letters were copied to the Council as well as to the employer's finance department, since the latter needed to be informed in order to calculate and pay the shift differentials to which employees on night or evening shifts were entitled.

[23] Mr. Eagles testified that after receiving the letter, he and Mr. Nixon went for a walk, had a meal and tried to catch up on their sleep, given that they were to start their

shift at 23:45 that evening. They then went to the dockyard to observe the STW.

[24] Mr. Eagles testified that while at FMF Cape Breton observing the STW, the grievors assisted in a "hands-on" way with the testing and calibration of the equipment on board as well as with the onshore communication facility through which the data stream was to flow. I pause to note that the evidence was clear that neither of the grievors had been assigned to the west coast crew; nor were they part of the work crew or paid in any way out of the west coast budget. However, having said that, it is also clear from Mr. Eagles' evidence (who was the only witness as to what the crew actually did during the STW) that they did not just watch what was going on during the STW. From time to time, they actively assisted with the work being carried out by the west coast crew. They worked as part of the team to troubleshoot and solve several problems that cropped up along the way.

[25] That they did so is not surprising and in some ways was to be expected. Both grievors were experienced technicians with many years of experience. As Mr. Eagles testified, and Mr. Joseph agreed, learning by doing was a part of being a technician. Mr. Joseph noted in cross-examination that learning by doing could range from taking notes of what was happening to "turning a screwdriver." It is not surprising then that the grievors' time during the STW included more than simply watching what was going on from behind the shoulders of the west coast crew.

[26] This type of learning may be contrasted with the more formal and organized form of learning that takes place sometimes off-site and sometimes in classroom-like situations. Mr. Brown testified that during his term as Council president, there had been six or seven occasions on which he had received calls from management asking him to agree to hours of course work that were outside the regular shift hours specified in the collective agreement. He noted that there might have been a navy-organized training course at Canadian Forces Base Stadacona in Halifax (near to but not on the same site as the dockyard at Cape Scott) or using a platform such as a vessel or a submarine that had hours different from those of a normal shift. He always provided the Council's consent in such cases because he considered it an important aspect of his members' training and education.

[27] Mr. Joseph testified that training included formal courses, such as might be given at the Canadian Forces Naval Engineering School (CFNES), or by an OEM, such as Lockheed Martin. Employees taking such courses would generally go to the school or the factory, as was the case. Often, such courses included PowerPoint presentations and hands-on work on demonstrator equipment. Many, although not all, such courses would provide grades and certificates at the end. As well, the hours of such courses might not have been the same as normal shift hours. So, for example, a course given by an OEM might have been delivered in the evening because the equipment was not available during the day or it might have been delivered to a number of employees in sequence because there was not enough "kit" to be used by everyone at once. He testified that in such cases, he always made an effort to contact the Council about any changes to a normal shift made necessary by training, and that when a shift change was necessary, he would most often issue a shift letter to give notice of the change.

[28] Returning to the chronology and issue at hand, on May 10, 2012, Mr. Nixon emailed Mr. Bouter and Ms. Schrader about the shift letter. He asked: "How does this work for us, west coasters were approved for an hour of OT [overtime] tonight so naturally we stayed. Are we going to get paid for this hour of OT?" (Exhibit E5, Tab 6). Ms. Schrader emailed back, stating: "Considering that you were instructed to follow FMFCB hours for the STW they certainly should pay you for it" (Exhibit E5, Tab 6). As it turned out, FMF Cape Breton did not pay, being of the opinion that the grievors were not part of its working crew and had been there only to observe.

[29] The question of how or why the grievors should be paid for the first two S1 (night) shifts they worked commencing May 9 and 10 became an issue after their return to Halifax. Mr. Eagles testified that he was uncertain as to what their rights were under the collective agreement. He spoke to Mr. Brown, the Council's president, on his return. In the end, the grievors decided to claim double time under the collective agreement for the first two night shifts and then a shift premium for the remaining shifts until their return to Halifax (see Exhibit U4).

[30] The employer paid the shift premium for all night shifts worked by the grievors, including the nights of May 9-10 and 10-11. But it refused to pay double time for those two night shifts, citing clause 15.06(c) of the collective agreement, which it said permitted it to amend shift schedules to accommodate training courses, on mutual

consent. The employer's position was that at their request, the grievors had been sent in effect for training and that they had consented to the shift change.

[31] And there, the issue between the grievors and the employer was joined.

A. <u>The collective agreement</u>

[32] The parties' positions were based on their respective interpretations of certain clauses of article 15 ("Hours of Work and Overtime") of the collective agreement as well as their understanding of how the facts fit to those clauses. Accordingly, it is necessary to set out the relevant clauses of the collective agreement.

[33] Clause 15.02 of the collective agreement divides hours of work into three shifts, as follows:

a. S1, being the night shift, from 23:45 to 8:15;

b. S2, being the day shift, from 7:45 to 16:15; and

c. S3, the evening shift, from 15:45 to 00:15.

[34] The grievors' regularly scheduled hours of work were on the day shift (S2) from 7:45 to 16:15. Clause 15.05 of the collective agreement recognizes the employer's right to transfer employees like the grievors from one shift to another within a workday, subject to the requirement to pay overtime, as follows: "15.05 An employee may be transferred from one shift to another within a workday subject to the application of clause 15.10 [which provides for overtime rates of pay]."

[35] "Overtime" is defined as ". . . time worked by an employee outside of the employee's regularly scheduled hours"; see clause 2.01(o) of the collective agreement. When an employee works overtime, he or she is entitled to double or triple time, depending upon the number of hours worked in excess of eight; see clauses 15.10(a) and (b).

[36] Clause 15.06 of the collective agreement deals as follows with pay premiums (not overtime) associated with working the night or evening shifts. It provides that employees working such shifts are entitled, depending on the circumstances, to either a shift premium (that is, a specified fraction of his or her regular pay) or to double time, but not both:

15.06 Notwithstanding the provisions of clause 15.02:

(a) An employee who works on the first (night) or third (evening) shift:

(i) on three (3) or more consecutive workdays within a workweek, or

(ii) on the first or on the first and second workdays in a workweek following a full workweek on the first (night) or third (evening) shift, or

(iii) on the last or on the last and next to last workdays in a workweek preceding a full workweek on the first (night) or third (evening) shift,

shall receive a shift premium as specified in clause 24.01.

For the purpose of clause 15.06(a), an employee on leave during the days referred to in clause 15.06(a) shall not be considered as breaking the consecutive workday or full workweek requirement of that clause.

For the purpose of clause 15.06(a)(i), a paid holiday shall not be considered as breaking the consecutive workday requirement providing three (3) days of shift work are scheduled.

Where shift work is scheduled for a full workweek which includes a designated paid holiday, the holiday shall not affect the requirements of a full workweek referred to in clause 15.06(a)(ii) and (iii).

(b) An employee who works on the first or third shift, other than as described in 15.06(a) shall be paid at double (2) time rate for each hour so worked and no shift premium shall be paid.

. . .

[37] However, another special provision is found right after these clauses, dealing with the need to amend shifts in order to accommodate attendance at training courses. Clause 15.06(c) provides as follows:

Shift while on Course

(c) Notwithstanding clause 15.05 and 15.06(a) and (b), the parties recognize the need to amend shift schedules by mutual consent to accommodate training courses.

[38] The employer also agreed to schedule shift work only when necessary, as follows:

> *15.07 The employer will schedule shift work only when necessary. On the occasion of shift on a project, the employer will give to the employees and Council, as much notice as practicable prior to the commencement of shift work.*

[39] Finally, clause 15.08 of the collective agreement lists as follows the amount of notice employees are to be given in ordinary course:

> *15.08 When a Monday or Tuesday shift is scheduled, employees will be notified by the end of their shift on the preceding Friday. When a Wednesday shift is scheduled, employees will be notified by the end of their shift on the preceding Monday. When a Thursday shift is scheduled, employees will be notified by the end of their shift on the preceding Tuesday. When a Friday shift is scheduled, employees will be notified by the end of their shift on the preceding Wednesday.*

[40] With these clauses in mind, I will now turn to the issues before me.

B. The basic issue

[41] The grievance was limited to the night shifts of Wednesday, May 9 and Thursday, May 10. The employer had paid the grievors a shift premium under clause 15.06(a) of the collective agreement. The grievors' position was that they were instead entitled to double time (for only those two shifts) because they had not been given the required notice under clause 15.08.

[42] The employer's position, on the other hand, was in essence that the shift change was necessary to accommodate a training course, that the grievors had consented to the change and that clause 15.06(c) of the collective agreement applied so as to bar any claim for any premium.

III. Submissions

A. For the Council

[43] Counsel for the bargaining agent, Raymond Larkin, commenced his submissions by saying that the following three questions had to be answered:

a. Was the employer obligated by clause 15.08 of the collective agreement to give notice of the shift change by the preceding Monday, and if so, was this clause breached?

b. Did clause 15.06(c) apply to the facts of this case?

c. If clause 15.08 was breached, and if clause 15.06(c) did not apply, was the employer obligated to pay the grievors at double time for the two night shifts at issue by reason of clause 15.06(b)?

[44] Mr. Larkin submitted that the answers to the first and last questions were "yes" and that to the second question, the answer was "no."

[45] He turned first to the question of whether clause 15.08 of the collective agreement applied to the facts of this case. He submitted that it did apply, that compliance with it was mandatory and that the notice periods it required were not modified by clause 15.07. He submitted that clause 15.08 had been added to the collective agreement. Until its addition, the notice required for a shift change had only to be — as provided in clause 15.07 — as much as was practicable. That created an ambiguity in application. It opened the door to disputes as to whether the required notice had been given as soon as was practicable. The addition of clause 15.08 represented an attempt by the parties to clarify the notice provision by establishing a bare minimum notice period over which there could be no argument. It did not preclude earlier notice where "practicable," but it made sure that there was a minimum notice period.

[46] Mr. Larkin submitted that on the facts, clause 15.08 of the collective agreement requires that notice of a shift change should have been given to the grievors by the preceding Monday. Notice given by a shift letter that the grievors received around noon (Victoria time) of a move to the night shift commencing the same day did not represent compliance with the clause. The fact that the grievors had learned of the change informally from the west coast crew the preceding evening did not represent proper notice under clause 15.08. The grievors could not have acted on such information. The direction had to come from the employer, if only because the shift premiums (or double time) specified for shift work by clauses 15.06(a) and (b) require its authorization.

[47] Mr. Larkin then moved to the question of remedy. He acknowledged that no clear remedy for the breach is specified in the collective agreement. He submitted that, however, an adjudicator has jurisdiction pursuant to subsection 228(2) of the *PSLRA* to ". . . make the order that [he or she] consider[s] appropriate in the circumstances . . ." and that such jurisdiction extends to awarding compensation by way of damages in an appropriate case; see *Horner v. Treasury Board (Department of National Defence)*, 2012 PSLRB 33 (upheld in 2013 FC 605, at para 13).

[48] With respect to the damages I ought to award, Mr. Larkin submitted that I should treat the situation as if proper notice had been given pursuant to clause 15.08 of the collective agreement. Had such notice been given, the grievors would have been compensated in normal course pursuant to the provisions of clause 15.06(a) or (b). One of two results would have applied, depending on the facts. Had the provisions of clause 15.06(a) applied, the grievors would have been entitled to a shift premium under clause 15.06(a). And in fact, this is what happened for all the night shifts after May 11. On the other hand, had the requirements of clause 15.06(a) not applied, the grievors would have been entitled to double time for every hour worked, pursuant to clause 15.06(b), but not to a shift premium.

[49] On the facts of this case, Mr. Larkin submitted that clause 15.06(a) of the collective agreement was not respected, insofar as the notice requirements for a shift change commencing May 9 and 10 were not met. That being the case, double time under clause 15.06(b) would have been payable. He added that I ought to order that the grievors be paid at the double-time rate for those two night shifts. He conceded that in such a case, it would be appropriate to set off against the award the shift premium that the grievors received for those two shifts, inasmuch as employees under clause 15.06 are entitled to one or the other but not both.

[50] That submission then brought Mr. Larkin to the issue of whether clause 15.06(c) of the collective agreement barred such a result. His submission was made in response to what he expected the employer to argue, which was that the shift premiums or double-time rates were not payable in a situation in which the change was the result of the need to amend shift schedules, on mutual consent, in order to accommodate a training course.

[51] On that point, Mr. Larkin submitted that clause 15.06(c) of the collective agreement applied only with respect to formal training courses of the type offered by schools, colleges or OEMs, not to on-the-job training, and that the mutual consent necessary to amend a shift schedule had to be between the employer and the Council, not the employer and the individual employee.

[52] With respect to whether the grievors' attendance at FMF Cape Breton could be considered a training course within the meaning of clause 15.06(c) of the collective agreement, Mr. Larkin submitted that it could not, arguing that "training" and "training course" are two different concepts, both in theory and in practice. He pointed to the evidence of both Mr. Eagles and Mr. Joseph. Both testified as to differences between on-the-job training, which he characterized as learning by doing, with the type of training offered by OEMs, schools or colleges. The latter usually have set hours, a syllabus and curriculum, formal lectures or presentations, often with PowerPoint, in a classroom setting, and they often (although not always) issue a certificate of some sort at the end of the course. If hands-on training was involved, it was in the context of working on a demonstrator model, as opposed to working on equipment at the work site. Given that distinction between the two types of training — one essentially ongoing every workday and the other happening infrequently and in formal settings, often away from the workplace — Mr. Larkin submitted that the parties' use of the phrase training courses must have meant an understanding that only the latter type was intended to be caught by clause 15.06(c). This was not the type of training that happened at FMF Cape Breton, and so clause 15.06(c) did not apply.

[53] With respect to the issue of whether there was mutual consent, Mr. Larkin submitted that both a true interpretation of clause 15.06(c) of the collective agreement and good labour relations practice make it clear that the consent has to be between the parties to the collective agreement — that is, the employer and the Council — and not between the employer and individual employees. He also submitted that the parties had agreed that expressions used in the collective agreement, if defined in the *PSLRA*, have the same meaning as given to them in the *Act*; see clause 2.02. Subsection 4(1) of the *Act* defines the word "parties," ". . . in relation to collective bargaining, arbitration, conciliation or a dispute . . . [as] the employer and the bargaining agent." Hence, the mutual consent required to trigger clause 15.06(c) had to come from the Council or its authorized representative, which did not happen in this case.

B. For the employer

[54] Counsel for the employer, Allison Sephton, commenced her submissions by stating the following:

a. there had been no breach of clause 15.08 of the collective agreement;

b. clause 15.06(c) applied to bar the claim for a shift premium or for double time that might otherwise have been payable in respect of a shift change; and

c. if clause 15.08 was breached, the only remedial order I should or could make was declaratory in nature.

[55] With respect to the first point, Ms. Sephton submitted that the arguments made on behalf of the grievors neglected the time spent travelling prior to their arrival in Victoria on Tuesday as well as the time spent on Wednesday from 7:45 to 23:45. If that time was included, the notice provisions of clause 15.08 of the collective agreement had been satisfied. She submitted that the time spent by the grievors on the Wednesday could not be considered work. They had known since the previous evening that the west coast shift would not start until the Wednesday at 23:45, they had not been working Wednesday morning while awaiting the employer's directions and they had spent the afternoon after receiving the shift letter on their own time.

[56] Even assuming that the notice provisions of clause 15.08 of the collective agreement had been breached, Ms. Sephton argued that no remedy had been provided. She compared the clause to others, such as clauses 15.05 and 15.07, in which the parties had clearly specified what was to happen in the event that the clause was triggered. On the other hand, clause 15.08 says nothing about what is to happen if proper notice is not given or, indeed, what is to happen if notice is given. It is silent. Since the clause speaks only about notice, the parties clearly did not intend that its breach would have any particular remedy.

[57] Ms. Sephton submitted further that the decision in *Horner*, which Mr. Larkin had relied on, could be distinguished. In that case, the employees had clearly been working during the hours in question. Since they had been working, they had been entitled to compensation based upon the breach of the collective agreement in that case.

[58] On the other hand, in this case, the grievors did not work at all on Wednesday, May 9 (or at least, not until 23:45 that evening). To treat them as if they had been working for the purposes of calculating the notice period required under clause 15.08 of the collective agreement would in effect be to compensate them for not working. That being the case, the only appropriate remedy in the circumstances, if any, would be a simple declaration to the effect that clause 15.08 had been breached.

[59] Ms. Sephton then turned to clause 15.06(c) of the collective agreement. She submitted that the clause applied in the circumstances of this case. The grievors initiated a request for training by way of observing the STW at FMF Cape Breton, a request that the employer accepted. She submitted that the word "training" had to be given a liberal meaning, one broad enough to cover the type of on-the-job training that was taking place while the grievors observed the STW at FMF Cape Breton; see, for example, *Labatt Breweries Ontario, division of Labatt Brewing Co. v. Brewery, General and Professional Workers' Union, Local 1*, [2003] O.L.A.A. No. 35 (QL); and *Babcock v. Treasury Board (Health and Welfare Canada)*, PSSRB File No. 166-02-18320 (19890503). Accordingly, it could be said that the grievors participated in a training course.

[60] Turning to the meaning of "mutual consent" in clause 15.06(c) of the collective agreement, Ms. Sephton submitted that to interpret the phrase as requiring the Council's consent would be absurd. The employee, not the Council, takes training, and his or her shift is altered. Surely, the employee ought to consent. And certainly, the grievors did not expect the Council to consent. They spoke to their managers and supervisors, not their Council, before moving to the night shift. Requiring the Council's consent would also create delays and possible confusion while the Council representative is contacted and advised of the situation. Limiting the necessary consent to the employee most affected is a simpler method, and interpretations that produce clear results are to be preferred to those that produce complicated ones; see *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55, at para 28.

[61] Accordingly, Ms. Sephton submitted that on the facts, the grievors' shift change had been necessary to accommodate a training course and that the grievors and the employer had mutually consented to the change. That being the case, clause 15.06(c) of the collective agreement applied, and neither shift premium nor double time was payable. Indeed, the employer ought not to have paid the shift premiums that it did for

those two shifts. It did so only out of good labour relations, not because of any obligation under the collective agreement. (She advised that the employer was not seeking to claw back any payment that had been made; she only wanted to emphasize that the employer's payment of the shift premium for those two shifts should not be taken as an admission on its part that clause 15.06(c) was not applicable.)

[62] By way of conclusion, Ms. Sephton submitted that clause 15.08 of the collective agreement was not breached or that if it was, the only appropriate remedy, if any, is a declaration to that effect. She also submitted that in the event damages were in fact awarded, any such damages ought to be offset by the shift premium that had been paid to the grievors for the two shifts at issue.

C. Reply on behalf of the Council

[63] Mr. Larkin maintained in reply that it could not be said that the grievors were not working on Wednesday, May 9. The fact that they were not actually working did not mean that they were not subject to the employer's control and direction. They had not been free to do whatever they wanted to that morning. They had to await the employer's direction as to what they should do. That being the case, they must be considered for the purposes of clause 15.08 of the collective agreement to have been working for at least part of May 9, meaning that the notice they received by way of the shift change letter did not satisfy the notice requirements of clause 15.08 for a night shift commencing on a Wednesday at 23:45.

[64] However, Mr. Larkin did agree that in the event that a breach of the collective agreement clause at issue was found and that an award of damages was appropriate, the shift premium they had received should be considered as a set off. Employees in the grievors' position are entitled under clause 15.06(a) or (b) to a shift premium or double time but not both.

IV. Analysis and decision

[65] On the facts before me, the questions I must address are the following:

a. Did the employer breach the notice provisions of clause 15.08 of the collective agreement?

b. If it did, and given that the grievors worked two S1 (night) shifts rather than their regular S2 (day) shifts, were they entitled to be paid pursuant to the provisions of clause 15.06(a) or (b)?

c. Was any entitlement to be paid pursuant to clause 15.06(a) or (b) that might otherwise exist negated by clause 15.06(c)?

A. <u>Did the employer breach the notice provisions of clause 15.08?</u>

[66] In essence, the relevant facts are as follows. The first of the two shifts at issue was scheduled for Wednesday, May 9, 2012, at 23:45. The grievors had been scheduled to perform their observations of the STW that day on their (and the west coast's) regular shift of 7:45 to 16:15. They were advised informally the evening before by members of the west coast crew that the work had been moved to the night schedule commencing at 23:45 on May 9. The morning of May 9, the grievors called their managers in Halifax, and by about 15:18 Halifax time had received from them a shift change letter stating that the shift ". . . will commence at 2345 hours, [Wednesday] 9 May 2012 and will continue until 8:15 hours 16 May 2012" (Exhibits E6 and U3).

[67] Dealing first then with the question of what "notified" in clause 15.08 of the collective agreement means, I am satisfied that it must mean "notified by the employer." The employer directs employees. The employer has the right to require (on proper notice) the employees to work shifts or to change from one shift to another. And the employer must pay the shift premiums, double-time rates or overtime that becomes payable as a result of employees working on shifts. An employee who shows up for a shift different from the one for which he or she was scheduled simply because someone other than the employer had said there would be a shift change could not claim an entitlement to the rates associated with shift work. Such attendance could not be said to be authorized work under the collective agreement. The fact then that in this case the grievors understood that the west coast crew's schedule had changed did not entitle them to change their own shifts on their initiative. They needed their employer's approval first.

[68] Given that conclusion, I am further satisfied that in order to comply with clause 15.08 of the collective agreement, the employer had to give notice of the change

by the end of the grievors' shift on the preceding Monday, which would have been 16:15 hours on Monday, May 7. That clearly did not happen. Hence, the notice requirement of clause 15.08 was not met, on its face.

[69] On this point, I was not persuaded that the notice periods specified in clause 15.08 of the collective agreement were modified or loosened by clause 15.07.

[70] I note first that clause 15.08 is new and that it was added to the collective agreement. Before its introduction, the relevant clause was clause 15.07. And that clause, standing alone, contains the seeds of possible difficulties in its application.

[71] I think it is fair to say that as a rule, employees are not enamoured of shift work. It disrupts family and social relationships. Employees accustomed to working day shifts would like as much notice as possible of the need to change shifts to enable them to plan for and minimize the disruption such shift changes would cause in their lives. They might expect the employer to be able to provide such notice because planning for special projects (such as the one at issue on the west coast) often starts weeks if not months in advance of the projected start date.

[72] But the fact that the employer need only give "as much notice as practicable" could give rise to disputes as to whether the employer could have given notice sooner than it eventually did. It could also diminish the importance of the employer's need to give such notice because it could always shelter behind an argument over whether it had been practicable. The introduction of a clause like clause 15.08 of the collective agreement limits the scope for such arguments by creating a minimum notice period. The existence of such minimum limits would also encourage an employer to give importance to timeline management so as to ensure that the proper notice is given as soon as is practicable — and in this case, at a minimum, by the times set out in clause 15.08.

[73] Moreover, to read clause 15.07 of the collective agreement as modifying clause 15.08 would render the latter of no value. To say that the notice periods in clause 15.08 could be altered if compliance for some reason was impracticable would simply be another way of saying that only such notice as is practicable need be given. But that is what clause 15.07 already says. The only way to give any meaning to clause 15.08 (and meaning must be given) is to conclude that the parties intended it to

place a minimum limit on the otherwise broader (and looser) limit established by clause 15.07. In other words, the notice period for a shift change might have to be greater than that under clause 15.08 if it is practicable (as provided in clause 15.07), but it can never be less than the period specified in clause 15.08.

[74] Accepting then that there was a breach of the notice provisions in clause 15.08 of the collective agreement, I will turn to the question of remedy, if any.

[75] In my view, and subject to the discussion with respect to clause 15.06(c) of the collective agreement that follows, the order that would be most appropriate in these circumstances is to award damages aligned with what the grievors would have earned pursuant to clause 15.06(a) or (b) had proper notice been given. In the case of the two shifts under consideration, clause 15.06(a) would not apply as they do not fall within any of the scenarios set out in that clause. Since the circumstances are other than those described in that provision, clause 15.06(b) applies. The grievors would therefore be entitled to an amount equal to double time for the hours worked, the rate that would have applied pursuant to clause 15.06(b). That amount would be reduced by the shift premium that the grievors received for those two shifts, on the grounds that had the proper notice been given, they would have received double time but not a shift premium for those two shifts.

B. <u>Does clause 15.06(c) apply?</u>

[76] This brings us to the employer's submission that such an award would not be appropriate because clause 15.06(c) of the collective agreement would have applied so as to bar any shift premium or double time for those shifts because the change had been necessary to accommodate training for which there had been mutual agreement. For ease of reference in considering this submission, I will repeat that clause:

> ***Shift while on Course***
>
> *(c) Notwithstanding clause 15.05 and 15.06(a) and (b), the parties recognize the need to amend shift schedules by mutual consent to accommodate training courses.*

[77] Having considered the submissions of counsel carefully, I am satisfied as a matter of interpretation that the parties intended that clause 15.06(c) of the collective agreement was to apply only to alterations in the start and finish times of an

employee's regular shift, when such alterations were:

a. for the purpose of enabling the employee to attend a formal course of training (as opposed to on-the-job training),

b. necessary so that an employee attending a training course could be considered as working during his or her regular shift even though the hours were different from those specified in clause 15.02, and

c. approved by an authorized Council representative.

[78] I reached that conclusion based on a number of observations, all of which tie together.

[79] First, clause 15.06(c) of the collective agreement speaks of amendments to shift schedules. The word "amend" carries with it the meaning of making minor changes or improvements to something, often to an existing text or law. It does not include an intent to fundamentally change or replace the thing being amended. Had the parties intended clause 15.06(c) to enable a substantial change to shift hours (as, for example, with clause 15.05), they would not have used the word "amend."

[80] This ties in with a second observation. The evidence on behalf of both parties was that training for employees is of two types. The first comprises formal training courses (involving classroom and hands-on demonstrations) that are provided by OEMs or, for example, the CFNES. The hours of such courses do not generally coincide exactly with the shift hours specified by clause 15.02 of the collective agreement. Those courses often start at 0800 or 0900 hours. Such start times are not so far off the start time of an S2 day shift as to require a complete change of shift, but they are far enough off to require an amendment to the 7:45 shift start time.

[81] The other type of training is the type of on-the-job training (or "learning by doing" in Mr. Larkin's words) that occurs in the normal course of a skilled employee's job. Repairing and maintaining existing equipment or installing, testing and operating new equipment always involves some education — some learning — on the part of the employees. It also makes possible the transfer of that experience and knowledge to co-workers who might not have experienced the same situations in the past. This type of training is experienced during normal working hours. It is part of what it means to

be a skilled technician or tradesperson. And it does not normally require a change, amendment or modification of the regular work hours.

[82] With this in mind, and while I accept that in normal course the word "training" could be interpreted broadly so as to include both on-the-job training as well as formal classroom instruction, I note that the phrase used in clause 15.06(c) of the collective agreement is "training courses." A course is something different from on-the-job training. It implies and usually entails a formal syllabus that includes a prescribed set of studies, topics or issues. So, for example, the Collins online dictionary defines a training course as "a series of lessons or lectures teaching the skills that you need for a particular job or activity." The Cambridge online dictionary provides a similar definition. It is, in other words, something closer to the first type of training than to the second.

[83] This meaning of the words "training course" also explains in my view the parties' decision to use the word "amend." On the evidence before me, most formal training courses or programs follow regular hours, often during the day, but with times that do not always coincide exactly with the regular shift times specified by clause 15.02 of the collective agreement. That being the case, some (but not complete) alteration — that is, an amendment — of regular shift schedules would be necessary to enable an employee to attend without triggering overtime or travel time entitlements under the collective agreement.

[84] These three points lead me to conclude that the parties intended clause 15.06(c) of the collective agreement to refer only to the minor changes to regular shift schedules that would in normal course be necessary to permit employees to attend formal training courses scheduled for times that are similar to but not identical to an employee's regular shift. They did not intend it to apply in a case in which an employee has to move to an entirely different shift. The employer's right to make that happen is covered by a different clause, clause 15.05. Nor did they intend it apply to the type of on-the-job learning that occurs (as the witnesses testified) almost every work shift.

[85] There is another, separate, reason for concluding that clause 15.06(c) of the collective agreement is not applicable. That clause specifies that amendments to the

shift schedule require the mutual consent of "the parties." On this point, I was not persuaded by the employer's argument that the word "parties" in clause 15.06(c) means the employer and the individual employee whose shift schedule is being amended.

[86] As noted by Mr. Larkin, expressions used in the collective agreement, if defined in the *Act*, have the same meaning as given to them in the *Act*; see clause 2.02. Subsection 4(1) of the *Act* defines the word "parties," ". . . in relation to collective bargaining, arbitration, conciliation or a dispute . . . [as] the employer and the bargaining agent." Added to that is the fact that as a general rule, the employer is not entitled to negotiate changes to the collective agreement with individual employees. To permit such negotiation would undermine the role of the bargaining agent. It would also lead to confusion in the workplace, with some employees negotiating rights or obligations different from their co-workers and different from those spelled out in the collective agreement. The general rule would have particular application when, as in this case, the employer is seeking to amend an expressly mandated shift schedule, the hours of which are clearly and specifically spelled out in clause 15.02. This conclusion is particularly true when in normal course under the collective agreement, an employee who works anything other than his or her regular working hours is entitled to other benefits under other clauses.

[87] Taking all of this together, I am satisfied that the mutual consent that is required in clause 15.06(c) of the collective agreement is that of the employer (or its authorized delegate) and the Council (or its authorized delegate). The evidence is clear that the Council knew nothing about the change until after the grievors returned to Halifax. That then is another reason for concluding that clause 15.06(c) does not apply in this case.

[88] I should state that the fact that the training in question was first proposed by the grievors, as opposed to something originating from the employer, was not relevant, in my view of the facts. Attendance at a training course or training that requires a change in normal shift hours must be approved, authorized and directed by the employer. Such authorization and direction applies regardless of who first suggests that training would be useful or appropriate. At the end of the day, the employer decides whether the training should take place, and the employer pays for it. All that

takes place within the context of the employer's right to direct the workplace and its obligation to pay its employees for their time.

[89] Accordingly, I am satisfied of the following:

a. the employer did not meet the notice requirements of clause 15.08 of the collective agreement with respect to a change of shift from a day shift to a night shift for the first two shifts at issue;

b. the appropriate remedy in the circumstances is an award equal to double time for the hours worked by the grievors for those two shifts, reduced by the shift premiums they received for those two shifts; and

c. clause 15.06(c) did not apply in the circumstances because the Council did not consent to the change and because what happened was not an amendment to a shift, and it was not done to accommodate a training course within the meaning of that clause.

[90] Accordingly, I make the following order:

(The Order appears on the next page)

V. Order

[91] The grievance is allowed, and the employer is ordered to pay to the grievors an amount calculated on the basis of double time for the hours worked on the two shifts, subject to a deduction for the shift premium already paid to the grievors for those two shifts.

[92] I will reserve jurisdiction for 30 days from the date of this order with respect to the calculation of that amount in the event that the parties cannot agree on what it should be.

March 09, 2015.

Augustus Richardson,
adjudicator